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No. 84-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, THE CHANCELLOR OF THE BOARD
OF EDUCATION OF THE CITY OF NEW YORK,
YOLANDA AGUILAR, LILLIAN COLON, MIRIAM
MARTINEZ and BELINDA WILLIAMS,

Appellants.

— against —

BETTY-LOUISE FELTON, CHARLOTTE GREEN,
BARBARA HRUSKA, MERYL A. SCHWARTZ,
ROBERT H. SIDE, and ALLEN H. ZELON,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLEES' MOTION TO AFFIRM JUDGMENT
APPEALED FROM OR TO DISMISS THE APPEALS
AND BRIEF IN SUPPORT OF MOTION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SECRETARY, UNITED STATES DEPARTMENT OF
EDUCATION, THE CHANCELLOR OF THE BOARD
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-against-

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ROBERT H. SIDE, and ALLEN H. ZELON,

Appellees.

On Appeal from the United States Court
of Appeals for the Second Circuit

APPELLEES' MOTION TO AFFIRM JUDGMENT
APPEALED FROM OR TO DISMISS THE APPEALS

Appellees move to affirm the judgment of the United States Court of Appeals for the Second Circuit entered in this action on July 9, 1984, in favor of appellees, or, in the alternative, to

dismiss the appeals of the appellants therefrom, on the ground that the judgment appealed from is so clearly in accord with the prior decisions of this Court in point that there is no substantial question for the Court to review, and the appeals may, therefore, be disposed of summarily.

If, as appellants themselves suggest, this court determines that it lacks appellate jurisdiction in this case, and treats the appellants' jurisdictional statements as petitions for writs of certiorari pursuant to 28 U.S.C. § 2103, appellees request that their memorandum be treated as one in opposition to such petitions.

In either procedural situation, appellees' position is substantially the

same: the judgment below is so clearly in accord with prior decisions of this Court that it should be affirmed (or the appeals dismissed summarily, or the applications for writs of certiorari denied).

Dated: New York, New York
September 5, 1984

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IN THE
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October Term, 1984

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DISMISS THE APPEALS

Question Presented

Does the unanimous determination of the United States Court of Appeals for the Second Circuit declaring unconstitutional the program of the Board of Education of the City of New York, in which funds provided under Title I of the Elementary and Secondary Act of 1965 are utilized to pay public school teachers to teach remedial courses in reading, mathematics and English as a second language, and to pay other Board personnel to provide clinical and guidance services, to students of elementary and secondary church schools on the premises of those schools, raise a substantial enough question for plenary review by this Court in light of the prior decisions of the Court?

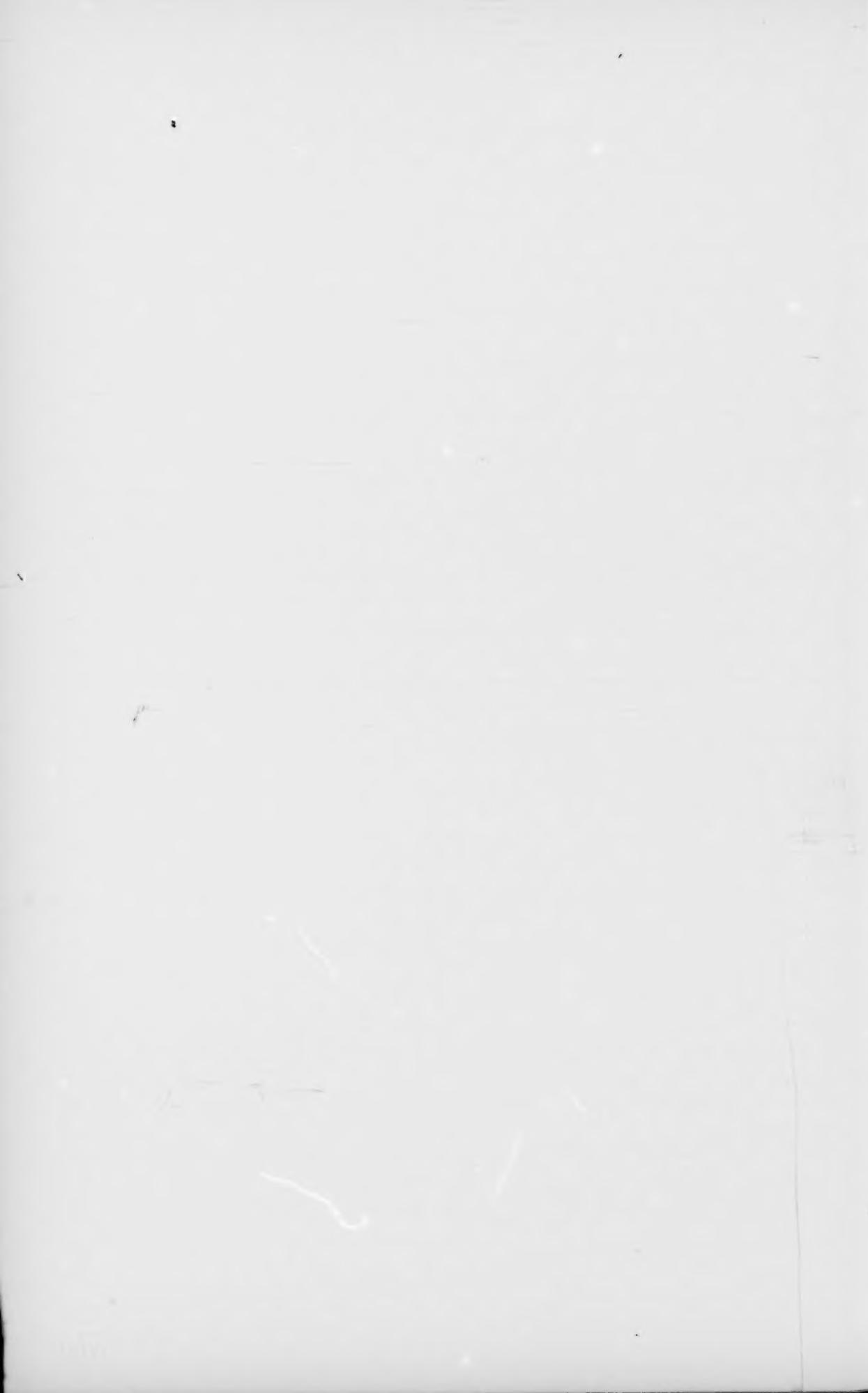


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DISMISS APPEALS

Statement of the Case

Title I of the Elementary and
Secondary Education Act of 1965 ("Title

I"), 20 U.S.C. §§ 2701 et seq. (as superseded by, but effectively incorporated in, Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 et seq.) provides annual Congressional appropriations for programs proposed by local educational agencies and approved by state educational agencies for children in elementary and secondary schools who are defined educationally as below age-level performance and who reside in areas designated in accordance with regulations as having a high concentration of children from low-income families (20 U.S.C. §§ 2722, 2732-34).

The Court of Appeals for the Second Circuit has construed Title I to author-

ize the provision of funds to subsidize programs that are conducted on the premises of what are referred to in the statute as "private" schools, but will be referred to in this brief as "church-connected" or "church" schools, since that is what in the main they have proved to be, certainly in the program with which we are concerned in this case (App., 6a, n.2).¹ It is clear, moreover, that all of the appellants believe, and the Secretary of Education ("Secretary") and the Board of Education of the City of New York ("Board") have acted upon the belief, that Title I authorizes such programs.

¹ 84% of the schools involved in this case are Roman Catholic parochial schools, and an additional 8% are Hebrew day schools (App., 7a). All references to "App." in this brief are to the Appendix to the Jurisdictional Statement submitted by the Secretary.

In any event, as the local educational agency in New York City, the Board has adopted a program, beginning in the school year 1966-67, providing for remedial courses in reading, mathematics and English as a second language and for clinical and guidance counselling to be given by public school teachers and counsellors to students of church schools on the premises of those schools as well as to students of public schools on the premises of the latter (App., 8a).²

The Board personnel employed in the program in church schools are chosen without reference to their religious affiliation, and the indication is that

² There is no issue in this case concerning the even-handedness of the division of Title I funds between church schools and public schools.

a large majority perform their services in schools with a different affiliation from their own (App., 11a-12a). A large majority also spend less than five days a week in the same church school and work in more than one such school (App., 12a).

The personnel in the program are supervised by and accountable to the Board alone, through supervisors who are each responsible for approximately 22 teachers, and who are, in turn, supervised by program co-ordinators (App., 12a).

Each supervisor, however, apparently makes approximately one visit per month to each church school under his

supervision, and although the visit is described as "unannounced," it is obviously well known to a teacher as soon as the supervisor enters his or her classroom, in which there are approximately ten children and no other adults, and even more so to a guidance counsellor as soon as the supervisor enters a nurse's room in which the counsellor is engaged in conversation with a single student. Reliance, therefore, on the fact that the teachers and counsellors will not engage in the religious activities of the church schools or introduce "religious matter" into their work at such schools necessarily rests heavily on their willingness to follow rules prescribed by the Board, which is to say

that reliance is placed on their good faith.

Although the Board teachers and counsellors have only routine contacts with the church school authorities, they have constant, daily conferences and discussions with the "regular classroom" (i.e., church school) teachers,³ and they also have less frequent conferences and discussions with the parents of their students (App., 12a). There is no evidence in the record of this case and no claim by the Board or by any other appellant that any of such conferences or discussions are the subject of sur-

³ It is acknowledged that one of the most important factors in the failure of attempts at Title I programs for students of church schools off the premises of those schools has been the lack of such communication between the public school teachers and their church school counterparts (C.A. App., A-30 to A-31).

veillance by supervisors or by any other Board personnel.

The teaching materials and equipment used in the Title I program in church schools are selected by Board personnel (App., 13a). The materials may not duplicate those used in regular classroom instruction or have any religious content (Id.). Both materials and equipment are labelled as property of the Board, and, when not in use by the public school teachers in connection with the program, are required to be kept under lock and key so that they may not be used for the religious or other purposes of the church school in which they are stored (App., 13a). To be effective, of course, this requirement

must continually be enforced by the public school teachers and, presumably, the enforcement must be spot-checked by their supervisors on some of the latter's "unannounced" visits.

The classrooms used in the Title program in church schools are located inside the church school buildings and are either rooms that were formerly used as regular classrooms of the church schools, and are presently "reserved" for use in the Title I program, or are presently used as regular classrooms when not used as Title I classrooms (App., 13a). The former is merely the "typical" situation (Id.). In either event, when used as Title I classrooms, they are required to be stripped of all

religious statues, symbols, pictures and artifacts, such as those normally present in the other classrooms of the same church school (App., 13a). This is another requirement that must continually be enforced by the public school teachers and their supervisors.

In the years that elapsed between the inception of the Board's Title I program in church schools and the closing of the hearing of this case in the District Court,⁴ there have been no reports that have reached the Board of any violations of its instructions or requirements in the area of church-state relations by the public school teachers or counsellors in the program or of any

⁴ Actually 16 school years were under consideration in the District Court, although appellants refer variously to 17 and even 20 years (Board J.S., 30; Secretary's J.S., 16).

attempts on the part of church school authorities or personnel to induce the public school personnel to commit any such violations (App., 13a). On the other hand, as indicated above, there is no evidence in the record of this case of the existence at any time of any type of surveillance intensive or extensive enough to produce any such reports (see pp. 5-7, supra). On the contrary, there is ample evidence in the record that there has never been any substantial surveillance of any kind in the Board's Title I program in church schools, or, if there ever has been, it has ceased completely in recent school years.

In the annual evaluation reports on each of the five parts of the Board's

Title I program in church schools during the school year 1981-82, the last year under consideration in the District Court, there is an exhaustive analysis of the educational aspects of each part of the program, based on detailed interrogation of the Board teachers and counsellors in the program (C.A. App., A-86 to A-249). There is no evaluation, however, of any aspect of the program covered by the Board's instructions and requirements in the area of church-state relations and no indication that a single question was asked of any participant in the program (Board personnel or otherwise) concerning violations, or possible violations, of those instruc-

tions or requirements (Id.). No other reports or documents were offered in evidence in the District Court by the Board or by any other appellant containing any evaluation of that kind.

Based on the foregoing facts and the legal precedents in cases in point previously decided by this Court, the Court of Appeals unanimously reversed the judgment of the District Court in this case (and rejected the reasoning in the opinion of a three-judge court in the Southern District of New York, in a virtually identical case brought by different plaintiffs, which the District Judge in this case had adopted⁵), and held that the Board's Title I program in

⁵ National Coalition for Public Education and Religious Liberty v. Harris, 489 F.Supp. 1248 (S.D.N.Y.) appeal dismissed for untimeliness, 449 U.S. 808 (1980).

church schools violated the Establishment Clause of the First Amendment (App., 3a-53a).

Argument

THERE IS NO SUBSTANTIAL QUESTION IN THIS CASE FOR PLENARY REVIEW.

At the outset, it should be noted that all three appellants base their argument that this case involves a substantial question on the premise that, at stake, is the provision of remedial instruction in certain subjects for school children who require such instruction and who attend church schools. Appellees seriously question even that statement of the issue. The critical aspect of the matter, however, is that such a statement does not raise any question of constitutional law with which this Court is concerned. Perhaps it poses a problem within the field of

education, or at least in church school education, but such a problem is not one of constitutional proportions.

On the other hand, as the Court of Appeals noted, it appears to have been this confusion of issues that led the District Court (and the three-judge court whose reasoning the District Judge followed) to make "bad" constitutional law out of a "hard" educational case or situation (App., 52a).

Throughout this case, in order to avoid that confusion, appellees have studiously avoided dealing with the non-constitutional merits or demerits of the educational program involved in the case insofar as it has been extended

into church schools, and we will continue to do so. By our restraint, however, we do not wish this Court to be misled into the belief that we concede that any program which diverts to church schools the limited amount of public funds available to further secular education in this country is "efficient" in either the short or long term.

In this brief, appellees will also refrain from repeating any argument presented to the Court of Appeals in support of our position that the Board's Title I program in church schools has the primary effect of both impeding religion in some respects and aiding religion in others. As the Court of Appeals has indicated, in the prior

cases in point, on which appellees rely on our present motion for summary disposition of the appeals on the basis of the "entanglement" test, this Court has refrained from expressing any view of the applicability of the "primary effect" test to programs of the type under consideration, so that appellees believe that any argument based on that test would be inappropriate on a motion for summary disposition. By our silence, however, we do not wish to indicate that we have in any way abandoned our position based on the "primary effect" test, or that we will not present it to this Court if our motion for summary disposition is denied.

The Legal Precedents

As noted by the Court of Appeals, the most important of the prior decisions of this Court in point is Meek v. Pittenger, 421 U.S. 349 (1975), in which this Court declared unconstitutional a Pennsylvania statute that had provided public funds for "auxiliary services," including remedial instruction, to be given by public school personnel to students of church schools on the premises of those schools. In doing so, this Court cited Earley v. DiCenso, companion case to Lemon v. Kurtzman, 403 U.S. 602 (1971), in which it had struck down a Rhode Island statute subsidizing the teaching of secular subjects by church school teachers to church school students on the premises of their

schools. The Court explicitly refused to recognize any constitutional distinction between Meek and Earley and Lemon based on the fact that in Meek the educational services were performed by public school personnel and that in Earley and Lemon such services were performed by church school personnel (421 U.S. at 371-372).

The Court explicitly held, in Meek, that the fact that the services were performed by public school personnel on the premises of church schools gave rise to a potential of administrative entanglement between church and state in that it would, in the words of the decision in Earley, "inevitably" require "comprehensive, discriminating, and continuing

state surveillance," which in itself was sufficient to make the program in question unconstitutional, although the program also fostered political entanglement (421 U.S. at 369-370).

As the Court of Appeals in this case also noted, although Meek is the most important precedent, it is not the only one, or even the earliest. In Public Funds for Public Schools v. Marburger, 417 U.S. 961 (1974), this Court had previously affirmed a judgment of a three-judge court holding unconstitutional a New Jersey statute that had provided public funds to church schools to permit them to hire personnel of local boards of education, who, under the supervision of such boards, would

teach remedial courses and give guidance counselling to the students of the church schools on the premises of those schools. Marburger, therefore, unlike Earley and Lemon, involved educational services performed by public school personnel, as opposed to church school personnel, on church school premises. The three-judge court held nevertheless, that the continuing review of the content of instruction given by the public school teachers, which would be necessary to ensure that no religious matter would enter into such instruction, created a potential for administrative entanglement that was impermissible.

In Marburger, moreover, this Court summarily affirmed the judgment of the

three-judge court, making it a precedent for the precise procedure appellees request the Court to follow in the present case.

In Wolman v. Walter, 433 U.S. 229 (1977), this Court was given the opportunity to review and, if it were so inclined, to reject the reasoning behind its decisions in Meek and Marburger. Under consideration was an Ohio statute that provided public funds for (1) speech and hearing diagnostic services and diagnostic psychological services to be rendered by employees of the public school system to students of church schools on the premises of the latter schools (with any treatment to take place off such premises), and (2) thera-

peutic, guidance and remedial services to be rendered by similar employees to church school students entirely off the church school premises.

Although the Court upheld both parts of the Ohio statute, it took pains to distinguish and effectively to reaffirm Meek. Thus, it upheld the provision for diagnostic services on the premises of the church schools because they were essentially health, not educational, services, and it sustained the provision for the therapeutic, guidance and remedial services because they were rendered off the premises of church schools, on sites "neither physically nor educationally identified with the functions of the nonpublic school,"

which were "truly religiously neutral locations" (433 U.S. at 246-247). The Court explicitly noted that its holding in Meek was based on the potential of administrative entanglement that arose from the fact that the Pennsylvania statute in that case had provided for educational services to be performed on the premises of church schools (433 U.S. at 247).

Appellants' Attempts to Distinguish
the Legal Precedents

Since the decision of the Court of Appeals directly affects the Board's program, appellees will first consider the Board's efforts to distinguish the precedents, after which it will consider the Secretary's arguments and the Intervenors' contentions.

The Board reaches Meek on page 29 of what is essentially a 33-page jurisdictional statement, of which the last three pages are devoted to other matters. When it does so, the Board offers three alleged points of distinction between the precedents and the present case.

(1) It begins by noting that "[i]n Meek, this Court placed great weight on the program's potential for political divisiveness..." (J.S., 29).⁶ The basic defect in this alleged distinction, if such it can be called, is revealed in the statement of it. The characteriz-

⁶ References to "J.S." in this brief are to the Jurisdictional Statement of the appellant indicated in the text.

ation of "political divisiveness" as being given "great weight"⁷ confirms the Court of Appeals' analysis in its decision in the present case that in Meek the "political strife argument was simply an additional consideration to bolster a conclusion already reached on other grounds, see 421 U.S. at 372"--i.e., the potential of administrative entanglement (App., 51a. n. 24). Neither the Board nor any other appellant explicitly argues to the contrary.

(2) The Board next asserts that "[t]he nonpublic schools at which remedial services are provided... are not the pervasively sectarian institutions which concerned this Court in Meek. 421 U.S. at 356" (J.S., 29). The

⁷ In advancing the same argument, the Secretary states that the decision in Meek "rested in significant part" on the potential for "political strife" (J.S., 15)

fatal flaw in this assertion is the page citation from Meek (421 U.S. at 356). At that point in his opinion on behalf of this Court, Mr. Justice Stewart merely set forth the allegations of the complaint concerning the characteristics of the parochial schools there involved. As the Court of Appeals has pointed out in the present case, nowhere in the opinion in Meek was it suggested, no less held, that the decision of this Court rested on all of those alleged characteristics (App., 46a-47a).

In that part of the Meek opinion in which the Court struck down the statutory provision for "auxiliary services," including remedial instruction, the schools under consideration were merely

described as "schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained" (421 U.S. at 371). That the parochial schools under consideration in the present case fit such description is fully demonstrated by an extensive note in the Court of Appeals' decision, based primarily on the affidavit of the Reverend Monsignor John J. Healy, Secretary of Education of the Department of Education of the Roman Catholic Archdiocese of New York, which appellants themselves introduced in evidence in the District Court (App., 45a-46a, n. 23).

A shorter, no less cogent, response to the Board's position also appears in the Court of Appeals' decision as follows:

"It would be simply incredible and the affidavits [submitted by appellants to the District Court] do not aver that all, or almost all, New York City's parochial schools receiving Title I aid have, in Justice Brennan's words, in Lemon, supra, abandoned 'the religious mission that is the only reason for the school's existence'" (App., 48a).

The Board's final argument is that "Meek involved a recently enacted program" whereas, allegedly, "[i]n connection with the [Board's] Title I program, there is seventeen years of experience where there has been no impermissible church-state involvement"

(J.S., 30). Since this argument is made more fully in the jurisdictional statement of the Intervenors, it will be dealt with below (see pp. 34-40, infra).

(3) The Secretary's main alleged point of distinction between the precedents and the present case (and the only such point that is not also advanced by the Board or the Intervenors) is that--

"the only 'surveillance' involved in New York City's Title I program is the supervision of public school employees by public education authorities. The City does not conduct any 'surveillance' of persons subject to the authority of any nonpublic school (cf. Lemon, 403 U.S. at 614-621)... such supervision does not entangle Church and state; it only 'entangles' the public education authorities with their own employees" (J.S., 14-15).

The fundamental weakness in this statement is its complete reliance on Lemon (which, to be sure, involved the surveillance of church school teachers by public education authorities), and the omission of any reference to Meek, in which, as noted above, this Court expressly held that the surveillance of public school teachers by public education authorities would also lead to administrative entanglement.

The Secretary's argument that the Board Title I program involves, or need involve, only the "surveillance" of public school employees by public education authorities is also untrue and misleading. To begin with, the program

involves the "surveillance," such as it is, of not only public school personnel, but also (1) church school classrooms (to see that they are "free" of religious symbols and that the public school books and equipment in them are kept under lock and key) and (2) church school students (since it is physically impossible to conduct surveillance of public school personnel to see if they are engaging in religious discussions with their parochial school wards without at the same time conducting a surveillance of the latter).

Even more significant is the "surveillance" that the Board's Title I program has completely neglected. As noted above, a critical part of the

program is the constant daily communication between public school teachers and their church school counterparts concerning the students in the program. There has concededly been no surveillance of that communication, and, of course, there cannot feasibly be any such surveillance.

(4) As indicated above, the Intervenors' main alleged point of distinction between the precedents and the present case is the alleged record of the Board's Title I program, which the Intervenors claim covers a 20 year period, whereas only 16 years were under consideration in the District Court. Specifically, the Intervenors contend that--

"The auxiliary services program struck down in Meek was challenged soon after its enactment, and the case reached this Court with a very meager record of how the program operated. Under these circumstances, the Court in Meek focused on the potential problems that could arise from such a program.

"There is no justification for such an approach in this case" (J.S., 16).

As the Court of Appeals pointed out in the present case, this final argument of appellees is based on a complete misconception of this Court's decisions in Early, Lemon, Marburger and Wollman as well as in Meek. As the court below noted, those cases were decided on the basis of the third of the three tests described in Lemon, the "entanglement" test, and the decision below implicitly

rests on the failure of the Board's Title I program in church schools to pass that test, and not the "primary effect" test (App., 37a-38a).

Intervenors carefully avoid specifying what they mean when they say that "none of the potential problems that concerned this Court in Meek has materialized in the New York City program" (J.S., 16). They do not describe those "problems." In the District Court, they were at pains to show that public school personnel in the program did not participate in church school activities or inject "religious matter" into their instruction or counselling and that the church school authorities did not try to make them do so (App., 13a). As the

Court of Appeals noted, however, although such evidence may possibly tend to prove that the program under consideration has had the "primary effect" of fostering religion, it does not prove that it has not resulted in "entanglement" (App., 37a-38a).

It is clear from the opinions of this Court, not only in Meek, but in Earley and Lemon, that administrative "entanglement" is itself a potential, the ever-present danger of some friction arising between state and church officials as a result of a necessarily never-ending and thorough-going surveillance of all participants in a program by the state officials, for which the good faith of the participants

is not acceptable as a substitute. The precedents clearly envisage a surveillance that is all but impossible to achieve, and, if achieved, would be so irksome as to be incapable of avoiding friction.

Appellants virtually admit that they have engaged in no such surveillance. Their own view of the program under consideration is that it merely requires surveillance of public school personnel by public education authorities, and they go so far as to fashion an argument out of that self-imposed limitation to the effect that it distinguishes the program in this case from those in Earley and Lemon (but not in Meek or Marburger) (see pp. 31-34, supra).

infra). It is a startling bootstrap argument.

Appellants also have to admit, or at least the record in this case discloses, that even the alleged surveillance of public school personnel by public education authorities is virtually non-existent. The only evidence of any surveillance is one visit per month to each church school in the program by a supervisor employed by the Board. For the other 21 or 22 school days in each month, reliance must be placed upon the willingness of the public school personnel to follow instructions-- i.e., on their good faith, which this Court in all of the precedents has held to be an

unacceptable substitute for surveillance.

In addition to the foregoing, appellants' final argument assumes that this Court was not aware of what it was doing in Meek when the Court struck down the Pennsylvania program there under consideration based on its "facial" unconstitutionality, without giving its proponents a chance to develop a record on the basis of which the Court could allegedly make a more reasonable decision. Any such argument, however, overlooks Wheeler v. Barrera, 417 U.S. 402 (1974), on which appellants, and particularly Intervenors, rely so heavily to urge that such a record is necessary (J.S., 17). As the Court of Appeals has noted in the present case,

Wheeler was decided one week before this Court summarily struck down the New Jersey program in Marburger based on its "facial" unconstitutionality and one year before Meek (App., 25a-26a), and when the Court decided Meek it reversed a three-judge court that had expressly refused to hold that the Pennsylvania statute there under consideration was "facially unconstitutional" (App., 36a, n. 16).

As the Court of Appeals also noted, the limited significance of Wheeler has been egregiously distorted by appellants, since (1) the clear and only holding of this Court in that case was that the Court was expressing "no view" of Title I without a program before it,



and (2) the Court did not in any way indicate that it would not consider a program "facially" when presented.

In the last analysis, in the absence of any distinction between the precedents relied upon by the Court of Appeals, and any real precedents to the contrary, appellants are forced to characterize the decision of the court below in meaningless terms. Thus, they refer to it as applying a per se rule," which, appellees suggest, when used out of context, is simply a way of characterizing a decision that applies the legal precedents to the facts of the case at hand adversely to the party making the characterization. The phrase is plucked out of the Court's opinion in

Lynch v. Donnelly, 104 S.Ct. 1355, 1361 (1984), without any attempt at showing how the facts or holding in Lynch are applicable to those in the present case, which, of course, they are not. The full statement in the opinion in Lynch, however, is more helpful: "In each case, the inquiry calls for line drawing; no fixed per se rule can be framed" (104 S.Ct. at 1361).

Appellants submit that, based on the precedents, the Court of Appeals in the present case has drawn a line which is reasonable and clear: it is at the door of the church school, and it would prohibit from entering that door for the purpose of performing teaching and related guidance and counselling any indivi-

duals who as so engaged are employees of the state or are paid with public funds.

Conclusion

This Court should grant appellants' motion to affirm the judgments appealed from, or, in the alternative, dismiss the appeals therefrom, or, if the jurisdictional statements are treated as petitions for writs of certiorari, they should be denied.

Respectfully submitted,

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Dated: September 5, 1984

